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No. 3206

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. P. FRICK,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

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Attorneys for Appellant.

PERNAU-WALSH PRINTING CO.

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We believe that counsel for the appellee have entirely failed to grasp the point of our objection to the decree of the lower court and to answer the same.

The fraud charged in the complaint is that "the said Bolling C. Robertson had not sought to enter the land for the purpose of securing the timber thereon, *but for the minerals found therein*" (Tr. fol. 10) and that appellant Frick, one of Robertson's proof witnesses and a subsequent purchaser of the land, knew and has always known that the said entry * * * was made in bad faith (Tr. fol. 11).

The fraud, in fact if the land were chiefly valuable for its minerals, and it was purchased as tim-

ber land, would be the lesser timber land price of $2.50 per acre for which the land could be gotten from the government, as against its mineral land price of $5 per acre if it was entered as mineral lands.

Now then, what is mineral land? We take it to be land chiefly valuable for the minerals contained in it.

So too we understand timber land to be land chiefly valuable for the timber standing and growing thereon.

Likewise it is its mineral or its *timber character and value at the time of the entry* that determines whether it must be entered and purchased under the Federal law governing mineral entries or under the Timber and Stone Act controlling the purchase and entry of timber lands.

Then the question for this court to determine here is, was the land chiefly valuable for its timber or chiefly valuable for its minerals when it was proved up by Robertson with the aid of Frick as a proof witness on October 28, 1907, the date of the issuance of the receiver's receipt therefor (Tr. fol. 8).

Now in considering the character of this land at the time it was entered it must not be forgotten, that one branch of the government—the United States Land Office—has already determined that the land is chiefly valuable for its timber and has issued, not only a certificate of purchase, to this

effect, but more than this has also issued a patent to Robertson for the land as timber land (Tr. fol. 9).

As we stated in our opening argument, the burden of showing this land was chiefly valuable for its minerals, when entered by Robertson, was on the government. And to sustain this burden it was incumbent on it to show this, not merely by a preponderance of evidence, but to demonstrate it by evidence that is "clear, unequivocal and convincing" (our opening brief, p. 7).

How did the government show that the land was chiefly valuable for its minerals on October 28, 1907, when the certificate of purchase was issued to Robertson? (Tr. fol. 8.)

The first evidence offered by the government to prove its case was the proof "taken before the Sacramento Land Office on the issuance of the final receipt to the entry man" (Tr. fol. 36, and see this proof among the original exhibits sent from the lower court and not printed in the transcript as per Praecipe for Transcript on Appeal, Tr. 87 and 88 sub'd. 13).

This was the proof on which the land office determined the land to be chiefly valuable for its timber and issued the certificate of purchase and later the patent. *And this evidence conclusively shows the land to be timber land.* The government having introduced it, on its own behalf, is bound by it.

When the government calls the entry man as a witness in its own behalf, it is bound by his testimony, unless such testimony is overcome by countervailing evidence.

U. S. v. Barber Lumber Co., 172 Fed. 960, bottom page 961, 962;
Choctaw & M. R. Co. v. Newton, 140 Fed. 225 at page 250;
U. S. v. Budd, 144 U. S. 154.

Thus far the government has produced the testimony of three witnesses all of whom have testified that the land is chiefly valuable for its timber.

Now, what of the evidence later introduced by it to show the land chiefly valuable for its minerals and to overcome this first testimony "by countervailing evidence".

The testimony of the three witnesses Mauk (Tr. 41), Meyer (Tr. 46) and Ellen Parker (Tr. 43), giving it its full weight, showed that at some uncertain time prior to October 28, 1907, some portions of this land had had mining operations conducted on them. But what portions and when the operations were carried on and what the area or extent of ground was used in these operations is not shown. *Not one of them testified that the land had any mineral value* in October, 1907. Mauk had not been on the land since 1902 or 1903 (Tr. fol. 41). Meyer could not tell the year he was there (Tr. fol. 46), but did say it was a good many years since he was over there (Tr. fol. 47). We have already com-

mented on Ellen Parker's testimony (opening brief, 14, 15 and 16). But *Mrs. Parker did say the land was good timber land* (Tr. fol. 45).

The government's case now stands three witnesses positively testifying that the land was chiefly valuable for its timber and one more government witness, Ellen Parker, saying it was good timber land, and three witnesses saying that mining had been done on certain indefinitely described parts of the property at indefinite times prior to October. 1907.

This is not the kind of "countervailing evidence" that can overcome the positive testimony of the entry man and his proof witnesses, or that clearly, unequivocally and convincingly shows the land chiefly valuable for its minerals.

The only other government witness that testified about the character of this land was Mr. Kingsbury, government mineral expert, who came to the conclusion *in 1910* from "just panning" and "finding a number of colors of gold in the pan" that the land in the trench on the southeast corner of lot 4 in his opinion "was sufficient indication for a man to go ahead and develop the land with the expectation of making it pay" (Tr. fol. 38). He did not remember whether he "examined the quartz or not" (Tr. fol. 28). "All this work was on lot 4, except the placer work, which started on the south end of lot 5 and ran north on to lot 4. It was something like 250 feet long by 100 feet wide. It was placer work *where they had washed out the gravel* * *

* *where mining work had been done."* Nowhere does Kingsbury tell us of *any placer gold bearing gravel still in place* or the extent of any such deposit nor of its value. Neither does he tell us of any quartz lodes or veins or the value or extent of any of such lodes or veins if any there were.

As to the timber on the land he says, "yes there was some good timber on there—*it was a timbered country* (Tr. fol. 40 bottom page).

Now we ask this court if there is one bit of testimony here that shows this land at the time Robertson entered it in 1907, to be chiefly valuable for its minerals? If there was any mineral ground how much was there and how valuable was it? As to these facts there is entirely wanting that "clear, unequivocal and convincing testimony" which the law requires to set aside a patent.

Supporting the testimony of the entry man and his proof witnesses, that the land was not chiefly valuable for its minerals, is the testimony of Mr. Norris English (Tr. fol. 70) and Mr. Seymour Hill (Tr. fol. 67),—one a mining engineer of large experience, the other a practical miner all his life—both of whom testify for the defense that the land has no mineral value and plus that is the testimony of J. C. Anthony (Tr. fol. 58) who says he and his associates turned the land down as of no value for mining purposes.

Then too it must not be forgotten that the uncontradicted evidence of Mr. Remick supported by Mr.

Frick, likewise uncontradicted, shows there is 5,000,000 feet, or about 25,000 feet to the acre, in the 200 acres of land here in controversy (Tr. fol. 47 and 53), and that this timber consisted of pine, fir and cedar. Remick also said this land was worth in October and November, 1907, $10 per acre (Tr. fol. 78), and in May, 1911, the California Door Company paid Frick $32.50 per acre for it for its timber (Tr. fol. 47).

In the face of this evidence as to the amount of timber on the land and its value how can testimony that mining had been done at uncertain times before October, 1907, on some parts of the land, likewise uncertain as to extent and amount and to values taken out and how can an *entire absence of evidence at the time the land was entered in October, 1907,* as to it being chiefly valuable or valuable at all for mining, ~~overchiefly valuable or valuable at all for mining,~~ overcome the positive testimony given before the land office and at the trial of this case, that the lands were chiefly valuable for their timber? We most earnestly contend that it does not and can not.

Now the government, on pages 15 and 19 of its brief says that a decree cancelling a patent will not be disturbed where the evidence offered in behalf of the defendants is outweighed by inferences to be drawn from their conduct.

We ask what inferences can be drawn from the conduct of either Robertson or Frick, tending to

show that they really intended to get this land for its minerals?

Robertson never mined on the property. Neither did Frick. Frick only sold it to the California Door Company for its timber after he bought it from Robertson. So there is nothing in the conduct of either Robertson or Fick from which any fraud can be inferred or from which any intent to secure this land as mineral land can be drawn.

We have already shown that Frick bought the land from Robertson after the certificate of purchase had issued. There is nothing wrong in this.

It is complained that Frick was buying timber in the vicinity of this land. What this has to do with the question of the mineral character of the land here in question we fail to see, though it is perfectly consistent with the inference that he thought this land was timber land.

The government lays great stress on the point that there was not a single witness called that did not testify there were mining or other improvements on the land.

Well, what good are abandoned mining improvements on land that is not mineral?

And furthermore, if the owner did not contest the entry, or try to set aside the patent, surely he did not think them of any worth.

Again improvements do not determine the character of the property. It is what is in or on the ground—timber or minerals.

Counsel state the unquestioned law that the findings of the lower court will not be disturbed unless the Appellate Court can clearly see that the decree is opposed to the weight of the evidence.

But what is the weight of the evidence here?

The testimony of the three witnesses, Robertson, Taylor and Frick, show that the land was timber land.

Mr. Remick's testimony shows that the land was timber land.

Mr. Kingsbury says it was good timber land in a timbered country.

Mrs. Parker says it was good timber land.

No witness testified that it was not good timber land.

No witness showed that it was more valuable for its minerals than for its timber at the time of entry or at any other time.

No witness showed that it was chiefly valuable for its minerals at any time.

No witness showed that it had any profitable mineral value at any time.

All the government's mineral witnesses testified to was that mining operations had been carried on in some parts of the property prior to Robertson's entry in October, 1907, but whether these operations were such as to yield profit or showed the land chiefly valuable for its minerals the evidence is entirely wanting and unsatisfactory.

Counsel in their excess of zeal, trusting to their imagination for their facts, and not to the record, make certain unwarranted charges of fraud, but we do not care to argue matters not in the record so we make no further comment on them.

We accordingly submit that the evidence fails to support the decree in this case and that the judgment should be reversed and the bill dismissed.

Dated, San Francisco,
January 22, 1919.

JORDAN & BRANN,
Attorneys for Appellant.